

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

VS.

CLIVEN D. BUNDY *et al.*,

Defendants.

Case No.: 2:16-cr-46-GMN-PAL

ORDER

Pending before the Court is the Motion in Limine (ECF No. 1436) filed by Defendants Steven A. Stewart, Eric J. Parker, and O. Scott Drexler (“Defendants”) to exclude all photographs of Defendants prone with weapons. Co-defendant Melvin D. Bundy filed a Motion for Joinder. (ECF No. 1462). The Government timely filed a Response. (ECF No. 1545).

I. LEGAL STANDARD

A. Motion in Limine

In general, “[t]he court must decide any preliminary question about whether . . . evidence is admissible.” Fed. R. Evid. 104(a). In order to satisfy the burden of proof for Federal Rule of Evidence (“FRE”) 104(a), a party must show that the requirements for admissibility are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987) (“We have traditionally required that these matters [regarding admissibility determinations that hinge on preliminary factual questions] be established by a preponderance of proof.”).

“Although the [FRE] do not explicitly authorize in limine rulings, the practice has developed pursuant to the district court’s inherent authority to manage the course of trials.”

1 *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984) (citing FRE 103(c)). In limine rulings “are
 2 not binding on the trial judge, and the judge may always change his mind during the course of a
 3 trial.” *Ohler v. United States*, 529 U.S. 753, 758 n.3 (2000); *see also Luce*, 469 U.S. at 41
 4 (noting that in limine rulings are always “subject to change,” especially if the evidence unfolds
 5 in an unanticipated manner). To exclude evidence on a motion in limine, the evidence must be
 6 “clearly inadmissible on all potential grounds.” *Ind. Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp. 2d
 7 844, 846 (N.D. Ohio 2004).

8 **B. Applicable Rules of Evidence**

9 “Irrelevant evidence is not admissible.” Fed. R. Evid. 402. “Evidence is relevant if:
 10 (a) it has any tendency to make a fact more or less probable than it would be without the
 11 evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401;
 12 *Velazquez v. City of Long Beach*, 793 F.3d 1010, 1028 (9th Cir. 2015).

13 FRE 403 requires the Court to determine whether the probative value of the evidence is
 14 substantially outweighed by the danger of unfair prejudice, confusion of the issues, or
 15 misleading the jury, or by considerations of undue delay, waste of time, or needless
 16 presentation of cumulative evidence. *United States v. Arambula-Ruiz*, 987 F.2d 599, 602 (9th
 17 Cir. 1993); *see* Fed. R. Evid. 403. “[P]rejudice alone is insufficient; *unfair* prejudice is
 18 required.” *United States v. Skillman*, 922 F.2d 1370, 1374 (9th Cir. 1990) (citing *United States*
 19 *v. Bailleaux*, 685 F.2d 1105, 1111 & n. 2 (9th Cir. 1982)). Unfair prejudice “appeals to the
 20 jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may
 21 cause a jury to base its decision on something other than the established propositions in the
 22 case.” *Id.* (internal quotation marks and citation omitted).

23 **II. DISCUSSION**

24 In this Motion in Limine, Defendants seek to exclude: “any photographs depicting them
 25 aiming their rifles at any persons . . . because none of these persons (and consequently, none of

1 the witnesses) were aware of the defendants doing so.” (Mot. in Limine (“MIL”) 3:25–27, ECF
2 No. 1436). Defendants reference assault and appear to be referring to Count Five of the
3 Superseding Indictment, Assault on a Federal Officer, in violation of 18 U.S.C. § 111(a)(1), (b)
4 (the only assault charge listed in the Superseding Indictment).¹ Defendants explain that, as a
5 matter of law, “If one is unaware of being in a position of harm, that person cannot be the
6 victim of assault, threats, obstruction, extortion, impeding or the alleged brandishing of a
7 firearm in furtherance thereof.” (*Id.* 3:26–4:3). “[T]hese photographs are irrelevant,” according
8 to Defendants, “because the United States cannot legitimately rely on the photographs to
9 establish assault.” (*Id.* 5:25–27). However, Defendants assert that danger of unfair prejudice is
10 high because the photographs may “provoke the jury into fearing the defendants or . . . impress
11 upon the jury that the defendants are militant and potentially violent persons.” (*Id.* 6:1–4). As
12 such, Defendants argue that the photographs’ low probative value is substantially outweighed
13 by the high unfair prejudice, and they should be excluded under FRE 403.

14 In its Response, the Government asserts that it will provide evidence at trial that “law
15 enforcement officers were aware of gunman on the bridge and that they had a reasonable
16 apprehension of immediate bodily harm.” (Gov’t Resp. 2:9–11, ECF No. 1545). Additionally,
17 the Government argues that even if the photographs were not relevant to Count Five, they are
18 relevant to other counts alleged in the Superseding Indictment. (*Id.* 2:12–21). Lastly, the
19 Government contends that Defendants “can be found guilty of Count Five under an aiding and
20 abetting theory, and is rather obvious that the photographs are relevant to show that Parker
21 acted with the intent to facilitate the crime of assault on a federal officer.” (*Id.* 3:1–3).

22 The Court finds that the photographs are not “clearly inadmissible on all potential
23 grounds.” *See Ind. Ins. Co.*, 326 F. Supp. 2d at 846. Based on the Government’s proffer, the
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25 ¹ The Court additionally believes that Defendants are specifically referring to Count Five because of their legal
cite to *United States v. Acosta-Sierra*, 690 F.3d 1111 (9th Cir. 2012), in which the defendant was also charged
under 18 U.S.C. § 111.

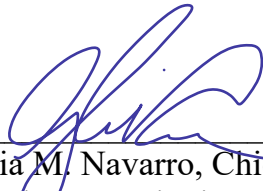
1 photographs are likely relevant, as they have a tendency to make a fact of consequence more or
2 less likely. *See* Fed. R. Evid. 401. Defendants are correct that criminal assault based on causing
3 the apprehension of imminent bodily injury requires that the victim is aware of the threat.
4 *United States v. Acosta-Sierra*, 690 F.3d 1111, 1121 (9th Cir. 2012). However, here, it is not
5 clear that the photographs are determinative that the alleged victim officers were not aware of
6 Defendants' positions prone with weapons on the bridge. Additionally, the Court agrees that
7 the photographs may be relevant to other charges, although the burden remains on the
8 Government to establish relevancy. Because of the potentially high probative value, the Court
9 is not persuaded that the photographs should be excluded under FRE 403. Accordingly, the
10 Court denies Defendant's Motion in Limine, and the photographs of Defendants prone with
11 weapons will not be excluded at this time.

12 **III. CONCLUSION**

13 **IT IS HEREBY ORDERED** that Defendants' Motion in Limine (ECF No. 1436) is
14 **DENIED.**

15 **IT IS FURTHER ORDERED** that Melvin D. Bundy's Motion for Joinder (ECF
16 No. 1462) is **GRANTED.**

17 **DATED** this 8 day of February, 2017.

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20 Gloria M. Navarro, Chief Judge
21 United States District Court
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